



REPUBLIC OF KENYA



Riechi & 2 others v Tiema & 6 others (Environment & Land Case E003 of 2022) [2025] KEELC 1395 (KLR) (14 March 2025) (Ruling)

Neutral citation: [2025] KEELC 1395 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E003 OF 2022**

**TW MURIGI, J
MARCH 14, 2025**

BETWEEN

**EDNA KWAMBOKA RIECHI 1ST PLAINTIFF
GEORGE AMBUCHI 2ND PLAINTIFF
ANTHONY MAINA AND OTHER DELTA DRIVE RESIDENTS 3RD PLAINTIFF**

AND

**PAULINE ANYONA TIEMA 1ST DEFENDANT
BRENEEN ELISHA MALOBA 2ND DEFENDANT
LOREEN AKOTH AJWANG 3RD DEFENDANT
NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY (NEMA) 4TH
DEFENDANT
NATIONAL CONSTRUCTION AUTHORITY 5TH DEFENDANT
NAIROBI METROPOLITAN SERVICES 6TH DEFENDANT
NAIROBI CITY COUNTY 7TH DEFENDANT**

RULING

1. Before me for determination is the Notice of Motion application dated 21st August 2024 in which the Plaintiffs/Applicants seek the following orders: -
 - a. Spent.
 - b. Spent.



- c. That this Honourable Court be pleased to issue orders for stay of any further proceedings of this suit.
 - d. That this Honourable Court be pleased to set aside the judgement delivered on 11th April 2024, decree and the consequential orders therein.
 - e. That the cost of this application be provided for.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Edna Kwamboka Riechi sworn on even date.

The Plaintiffs/applicants Case

- 3. The deponent averred that the hearing of this matter proceeded on 20th February 2024 in their absence and that of their previous Advocate. She further averred that they were not aware of the hearing date.
- 4. She contended that the Plaintiffs are keen on defending their case which raises triable issues and beseeched the court to accord them an opportunity to be heard.

The 1st – 3rd Defendants/respondents Case

- 5. The 1st-3rd Defendants opposed the application through a replying affidavit sworn by Breneen Elisha Maloba on 10th September 2024. The deponent contended that the application lacks merit as the hearing date of 20th February 2024 was fixed on 7th November 2023.
- 6. He further contended that the Plaintiffs have not given any reasonable reason why they were physically and virtually absent in court on the hearing date despite having been personally served with the hearing date.
- 7. He further contended that he had executed the court decree dated 11th April 2024 and had finished developing his house worth 25 million. According to the deponent, the Plaintiffs have not offered any explanation why the Plaintiffs waited 3 months after delivery of the judgement to take action. He implored the court to award him costs of ksh.800, 000/= if it allows the application.

The 7th Defendant's Case

- 8. The 7th Defendant opposed the application vide the grounds of opposition dated 29th October 2024 raising the following grounds:-
 - a. The Plaintiffs application offends the provisions of Order 9 Rule 9 and 10 of the Civil Procedure Rules.
 - b. That the Plaintiffs filed a consent of change of Advocates dated 30th August 2024 to regularize an irregular application.
 - c. The Plaintiffs application does not set out the reasons to warrant the setting aside of the judgment.
 - d. That the application does not set out the terms and cogent reasons to warrant the invocation of Order 12 Rule 7 of the Civil Procedure Rules
- 9. The Applicants filed a supplementary affidavit in response to the 1st – 3rd and 7th Respondents relying affidavits in which they reiterated the contents of the supporting affidavit.
- 10. The 4th-6th Respondents did not file any response to the application despite being duly served.



The application was canvassed by way of written submissions.

The Plaintiffs Submissions

11. The Plaintiffs filed their submissions dated 20th February 2024.
12. On their behalf, Counsel submitted that the only issue for the court's determination is whether the judgment delivered on 11th April 2024 should be set aside. Counsel submitted that the non-attendance of the Plaintiffs during the hearing was not deliberate but was by occasioned the negligence of their former Advocate who failed to inform them of the hearing date. Counsel submitted that the Plaintiffs will suffer great prejudice if the orders sought are not granted. Counsel submitted that the Plaintiffs' former Advocate's actions should not drive the Plaintiffs away from the seat of justice. To buttress this point, Counsel relied on the case of James Mwangi Gathara & another v Officer Commanding Station Loitoktok & 2 others [2018] eKLR.
13. Counsel urged the court to exercise its discretion under Section 3A of the *Civil Procedure Act* and Article 159 of *the Constitution* and allow the application as prayed. To buttress this point, Counsel relied on the case of PIO V BO & Another [2021] eKLR.
14. Counsel further submitted that it is in the interest of justice that the Plaintiffs be given an opportunity to exercise their rights as enshrined in *the Constitution* and prosecute the matter to its logical conclusion.

The 1St-3Rd Defendants Submissions

15. The 1st-3rd Defendants filed their submissions dated 14th January 2024.
16. In the submissions, Counsel reiterated the contents of the replying affidavit.

The 7Th Defendant Submissions

17. The 7th Defendant filed its submissions dated 12th February 2024.
18. On its behalf, Counsel submitted that the main issue for determination is whether this court should stay and set aside the judgment. Counsel submitted that the instant application offends the provisions of Order 9 Rules 9 and 10 of the Civil Procedure Rules as it was filed by the firm of Modi & Co. Advocates post judgement. Counsel argued that the firm of Modi & Co Advocates lacked legal capacity to file the instant application. To this end, Counsel relied on the case of James Njogu v Muriuki Macharia (Environment & Land Court Case 17 of 2016) [2020] KEELC 1311 (KLR) (24 September 2020) (Ruling).
19. Counsel argued that even if the Plaintiffs' change of Advocates was procedural, they have not given any tangible reasons to warrant setting aside the judgement. Counsel further argued that the reasons advanced by the Plaintiffs should not be entertained since the case does not belong to the Advocate but to the clients. Counsel submitted that the Applicants have not explained the delay of 4 months in bringing this application. To buttress this point, Counsel relied on the case of Rachuonyo v Jaramogi Oginga Odinga University of Science & Technology (Cause E053 OF 2022) [2025] KEELRC 305 (KLR) (11 February 2025) (Ruling).
20. Counsel submitted that the instant application is meant to deny the Respondents the fruits of their judgment. Counsel further submitted that the Applicants have not offered any security for costs as a sign of good faith. It was also submitted that Order 26 Rule 25 of the Civil Procedure Rules makes it a prerequisite for security for costs to be furnished as a precondition to prevent the dismissal of a suit.



Analysis And Determination

21. Having considered the application, the respective affidavits and the rival submissions, the only issue that arises for determination is whether the judgment delivered on 11th April 2024 should set aside.
22. The Defendant contended that the instant application offends the provisions of Order 9 Rules 9 and 10 of the Civil Procedure Rules as the firm of Modi and Co Advocates came on record for the Plaintiffs post judgment.
23. The record shows that the Plaintiffs' former advocates and their current advocate filed a consent in accordance with the provisions of Order 9 Rules 9 and 10 of the Civil Procedure Rules. From the foregoing I find that the firm of Modi & Co Advocates is properly on record for the Plaintiffs/Applicants.
24. The Applicants are seeking to set aside the judgement delivered on 11th April 2024. Order 12 Rule 7 of the Civil Procedure provides that:

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”
25. The power of the court to set aside its judgment is discretionary. The discretion must be exercised judiciously.
26. In the case of Patel v E.A. Cargo Handling Services Ltd (1974) E.A 75 the court held that: -

“There are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just...The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules”.
27. The Plaintiffs' explained that their non-attendance on the hearing date was occasioned by their former advocate who failed to inform them of the said date. The Plaintiffs further explained that the said Advocates also failed to attend court on that day due to negligence. Counsel submitted that the Defendants are elderly and that the mistakes of their counsel should not be visited upon them.
28. The record shows that this matter proceeded for hearing on 20th February 2024 after the court was satisfied that the Applicants had been served with the hearing date vide their Counsel. The Plaintiffs' case was dismissed with costs on 20th February 2024 for non-attendance.
29. The record shows that the hearing date of 20th February 2024 was set on 30th October 2023, in the absence of Counsel for the Plaintiffs. The 1st-3rd Defendants served the same as evidenced by the affidavit of service on record. Neither the Plaintiffs nor their Advocate were present on 20th February 2024 when this matter proceeded for hearing.
30. The general principle is that an Applicant should not suffer due to the mistake of its counsel. This was the position in Lee G Muthoga Vs Habib Zurich Finance (K) Ltd & Another Civil Application No 236 of 2009 where the court held that;

“It is a widely accepted principle of law that a litigant should not suffer because of his advocates oversight, is well settled that mistake of counsel should not be visited upon the litigant.”



31. The court has inherent discretion to give orders which are necessary to meet the ends of justice. Section 3A of the Civil Procedure Act provides that”-

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

32. Section 1A and 1B of the Civil Procedure Act provides for the objective of the Act which is to ensure the just, expeditious, proportionate and affordable disposal of cases.

33. No evidence was adduced to show that the Plaintiffs were notified by their Advocate that the matter was slated for hearing on 20/02/2024. From the foregoing, I find that the Plaintiffs have given plausible reasons why they did not attend court.

34. Article 50 of the Constitution entitles every person to a fair hearing. The rules of natural justice provide that no man shall be condemned unheard. Halsbury laws of England, 5th edition 2010 vl 61 at para 639 states that;

35. “The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audi alteram partem rule) is a fundamental principle of justice.”

36. It would be unjust and indeed a miscarriage of justice to deny the Plaintiffs an opportunity to be heard.

37. In the end, I find that the application dated 21st August 2024 is merited and the same is hereby allowed in the following terms:-

- a. The judgment delivered on 11th April 2024 is hereby set aside.
- b. The Plaintiffs shall pay to the Respondents thrown away costs of Kshs100,000/= within 30 days from the date of this ruling.
- c. In default of prayer No. (b) above the judgment shall lapse and the Respondents shall be at liberty to execute the judgment.

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 14TH DAY OF MARCH, 2025.

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T. MURIGI

JUDGE

In The Presence Of:-

Gitau Mwara for the 1st-3rd Defendants.

Ahmed – Court assistant

